UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

AIM AEROSPACE SUMNER, INC.,	)		
	)		
Respondent	)		
	)	Case Nos.	19-CA-203455
And	)		19-CA-203586
	)		
INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 751,	)		
	)		
Charging Party	)		

RESPONDENT'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

NOW COMES AIM Aerospace Sumner, Inc., Respondent or AIM herein, and files its Brief in Support of Cross-Exceptions to Administrative Law Judge's Decision as follows:

STATEMENT OF CASE

This case arises out of an effort by employees employed at Respondent's Sumner, Washington facility to oust the International Association of Machinists, District 751, (Union) as their exclusive bargaining representative. The effort culminated in a majority of unit employees signing a petition declaring that they no longer wished to be represented by the Union. The petition was presented to Respondent, and after reviewing and validating the petition, Respondent announced on July 24, 2017,[1] that it was withdrawing recognition from the Union. The Union filed an initial unfair labor practice charge on July 27, and a second charge on July 31. (GC Exhs. 1(a), 1(c)). On October 27, the Regional Director for Region 19 issued a consolidated complaint alleging that Respondent had committed certain unfair labor practices,

[1] All dates are 2017 unless otherwise indicated.

including unlawfully withdrawing recognition from the Union. (GC Exh. 1(g)). On November 9, Respondent filed a timely answer denying the material allegations of the consolidated complaint. The matter was heard before Administrative Law Judge Eleanor Laws on February 13, 14, and 15, 2018, in Seattle, Washington.

Although not directly relevant to this administrative proceeding, the Director instituted a parallel proceeding in the United States District Court for the Western District of Washington, seeking interim injunctive relief under § 10(j) of the National Labor Relations Act, as amended. In support of this petition, the Director presented affidavits from most of the witnesses who would eventually testify in the administrative hearing. On February 13, 2018, following an in-court hearing on February 7, 2018, the court denied the Director's petition for injunctive relief.

On May 16, 2018, the Administrative Law Judge issued her decision, in which she dismissed all of the allegations of the consolidated complaint, save one. Specifically, the Judge found merit to the allegation that Respondent violated §§ 8(a)(1) and (3) of the Act by promoting Lori-Ann Downs-Haynes to a receiving clerk position. The Charging Party subsequently filed timely exceptions, which contained a supporting brief. Respondent is filing an Answering Brief simultaneously with its cross-exceptions and this supporting brief.

STATEMENT OF FACTS

A. Background

Respondent operates three facilities in the general Seattle, Washington area, where it manufactures composites and ducting for the aerospace industry. These facilities are located in Auburn, Renton, and Sumner, Washington. (Tr. 25-26). Only the Sumner facility is directly involved in this proceeding. Prior to 2013, all three facilities operated on a nonunion basis. However, in 2013, following an election, the Union was certified as the exclusive representative

of the Sumner employees. Negotiations between AIM and the Union ultimately succeeded, and the parties agreed to a four-year collective bargaining agreement (CBA), effective from April 25, 2014 through May 1, 2018. (Jt. Exh. 2).

B. Employees Cole and Downs-Haynes Start Employee Petition

In mid-June 2017, several employees decided to initiate an effort to remove the Union as the employees' bargaining representative. The two primary leaders were Becky Cole and Lori-Ann Downs-Haynes. Cole testified that she had never supported the Union and had been waiting for the opportunity to oust the Union for a few years. According to Cole, employees were expressing dissatisfaction with the Union and what employees were receiving for their monthly dues. Cole had hoped that other employees would take the lead, but when they didn't, she and Downs-Haynes began discussing doing it themselves. Cole previously had worked at an employer where the union had been decertified and she was somewhat familiar with the process. Cole also did some research on the internet and was able to locate a sample decertification petition, which she printed off her computer. During her discussions with Downs-Haynes, Cole made it clear that she did not want to be out front in soliciting signatures on the petition. Cole characterized herself as not being very social and her demeanor was clearly that of a person who held strong opinions and was not afraid to voice them. Further, Cole was older than Downs-Haynes, and her leg had been bothering her. Downs-Haynes, on the other hand, was more social and had no reservations about soliciting employees to sign the petition. Thus, it was agreed that Cole would assist in the background, but that Downs-Haynes would take the lead in getting the petition signed. (Tr. 258-263, Resp. Exhs. 3, 4).

Downs-Haynes testified that she joined the Union after it was voted in because she had been told that she needed to join in order to maintain her job. At some later point in time, she

learned that this was not true. [2] When she questioned Union steward James Herness about this matter, he indicated that she would have to wait to get out of the Union, but she would still have to pay dues. Downs-Haynes then asked if there was another way, to which Herness responded that she could get a petition signed. Downs-Haynes asked how many signatures she needed, and Herness responded that she needed 60%. Downs-Haynes testified that she was displeased with the Union and the fact that the dues kept going up, which caused a hardship for her as she was a single mother with two children. [3] In talking with other employees, Downs-Haynes learned that there were others who felt as she did, and in June and July, she and Cole discussed starting a petition. Cole handled the paperwork, and Downs-Haynes began getting signatures on the petition. A few other employees helped collect signatures on the second and third shifts. The first signatures on the petition were collected on June 28. (Tr. 276-283).

C. Downs-Haynes Seeks and Is Awarded Receiving Clerk Position

On or about May 21, Respondent posted a position opening for a receiving clerk. Consistent with prior practice, Respondent posted the position on a software program known as "Birddog HR." It then posted the position by the time clocks in the facility. On or about June 6, Respondent offered the job to Ervin Taylor, an external candidate. Taylor accepted the position and began work on June 12. After two weeks, however, Taylor stopped showing up, and the job was reposted on or about June 29. (Tr. 430-432, Resp. Exh. 19).

[2] The CBA contains a maintenance of membership clause. Employees are not required to join the Union, but if they do, they must maintain that membership for the life of the contract. (Jt. Exh. 2).

[3] The record reflects that the Union's monthly dues increased to $49.95 in 2016 and to $50.60 in 2017. (Resp. Exh. 10).

In the meantime, on or about June 4, Downs-Haynes had filed an on-line application seeking the receiving clerk position, and had completed a request for transfer on June 6. (Resp. Exh. 5). Ruffcorn testified that she did not become aware of Downs-Haynes' request until after Taylor had been offered the job. (Tr. 433). Accordingly, she had not been considered in the initial hiring process. However, when Taylor left, Respondent decided to look first at the internal candidates, of whom there were only two, Downs-Haynes and Laura Hobbick. Respondent had not initially interviewed Hobbick, as she had no shipping/receiving experience, but with the reposting of the position, Respondent interviewed both Hobbick and Downs-Haynes. Ruffcorn interviewed Hobbick on June 30. During this interview, Hobbick indicated that she was more interested in an engineering position. (Tr. 434-435, Resp. Exh. 20). Ruffcorn interviewed Downs-Haynes on July 6. Downs-Haynes was specifically interested in shipping/receiving, and she had prior experience. She also indicated that she had filled in at AIM when shipping/receiving needed help. [4] (Tr. 436-437; Resp. Exh. 21). Ruffcorn discussed the matter with the shipping/receiving supervisor, and he agreed that Downs-Haynes should be offered the position. (Tr. 438-440; Resp. Exh. 22). On July 11, Respondent offered the job to Downs-Haynes, retroactive to the beginning of the pay period. (July 3). Her rate of pay was adjusted from the top manufacturing rate of $13.60 to the top support rate of $14, in light of her prior shipping/receiving experience. (Tr. 440-442).

[4] Downs-Haynes testified that she actually had only filled in on one occasion. (Tr. 307). This clearly came as a surprise to Ruffcorn, as she had been advised by the supervisor that Downs-Haynes had helped out in shipping/receiving on multiple occasions. (Tr. 472).

D. AIM Is Presented With Petition And Withdraws Recognition

The last two signatures on the petition were collected on July 20, and on July 21, Cole presented the petition to Ruffcorn. (Tr. 263-266, 415-416). The petition stated that the "undersigned employees . . . do not want to be represented by IAM Local 751." The petition further requested that AIM withdraw recognition from the Union if it determined that the petition was signed by a majority of unit employees. (Jt. Exh. 1). That same day, Ruffcorn undertook to analyze the petition. Specifically, Ruffcorn (1) compared each signature to an exemplar in AIM's files to verify authenticity, (2) eliminated duplicate signatures, (3) reviewed a list of current employees to determine whether the signers were still employed, and (4) counted the number of valid signatures to determine whether the petition was in fact signed by a majority of unit employees. Ruffcorn updated this analysis on Monday, July 24, 2017. She determined that as of that date, there were 142 valid signatures out of a total unit of 272 employees. (Tr. 416-423; Resp. Exhs. 13, 14). Based on its determination that the Union had lost majority support, AIM notified the Union on July 24, 2017, that it was withdrawing recognition effective immediately. (Resp. Exh. 15).

ISSUE

Whether the "promotion" of Lori-Ann Downs-Haynes to a vacant receiving clerk position violated §§ 8(a)(1) and (3) of the Act? [Exceptions 1-15].

ARGUMENT

AIM Lawfully Awarded Downs-Haynes the Receiving Clerk Position

Paragraph 11 of the consolidated complaint alleges that Respondent promoted Downs-Haynes to a receiving clerk position in order "to discourage employees from engaging in union and/or protected, concerted activities." Paragraph 15 alleges that in doing so Respondent

discriminated "in regard to the hire or tenure or terms or conditions of employees" in violation of §§ 8(a)(1) and 8(a)(3) of the Act. The ALJ erred in finding merit to these allegations.

The proposition that Respondent "discriminated" against employees, thereby "discouraging" employees from engaging in union activities is, at least at first glance, difficult to understand. There is no question that the receiving clerk position was open and waiting to be filled. Downs-Haynes requested a transfer to the position before she even began her decertification efforts. The job was initially filled by an external candidate, who abandoned the job after two weeks. Respondent then interviewed the only two internal candidates for the position, both of whom opposed the Union, and offered the job to the admittedly more qualified employee. Where is the discrimination? As there is no one who engaged in pro-union activity who was disfavored, how would awarding a clearly open position to an employee who engaged in anti-union activity constitute "discrimination" or encourage or discourage union activity? There simply is no basis on which any employee, including Downs-Haynes herself, would reasonably conclude that Downs-Haynes was awarded the position based not on her qualifications, but because she was leading a Union decertification campaign. And there is no evidence that any employee knew what hourly rate Downs-Haynes was being paid. Finally, Respondent did nothing and said nothing that would create any impression in the minds of employees that Downs-Haynes was awarded the position based on her anti-union activities.

The ALJ did not find that Downs-Haynes was *unqualified* for the receiving clerk position. Instead, she found that there were *external candidates who were more qualified* than Downs-Haynes. (JD 19: 39-45). But whether or not Downs-Haynes was the most qualified candidate for the job seems largely beside the point. She clearly was the most qualified internal candidate. If there was discrimination, it was not against any employee of AIM. Respondent is

unaware of any Board or court decision where discrimination has been found because the employer favored an employee over a nonemployee.

Indeed, the whole "reward" theory espoused by the General Counsel, and adopted by the ALJ, is problematic. This is not a case in which the "reward" was entirely gratuitous and lacked any supporting basis. Respondent had a job to fill, and someone was going to be awarded the position. It was simply a question of who. Within Respondent's work force, there were only two candidates seeking the position. While Downs-Haynes was not entitled to be rewarded for her efforts to oust the Union, she most certainly had a right not to be penalized for such activities. It also cannot help but be noted that Downs-Haynes is an African-American in a largely Caucasian workforce. Denying her the position could have been viewed as discriminatory. Between Downs-Haynes and Hobbick, the only two internal candidates, there really was no question that Downs-Haynes was the more qualified and experienced candidate. So, if Downs-Haynes should not have been awarded the position, who should Respondent have hired from outside? More critically, who would Respondent have hired? The ALJ found a violation, but proffers no answer to these questions.

In finding a violation, the Judge, citing *Miramar Sheraton Hotel,* 336 NLRB 1203 (2001) as support, purported to apply a *Wright Line* discrimination analysis. (JD 18-20). However, there are critical distinctions between this case and *Miramar*. First, the complaint allegations are mirror images of each other. In *Miramar,* the complaint alleged that wage increases were intended to *encourage anti-union activities;* whereas, here the allegation is that the promotion was in order to *discourage pro-union activities.* Perhaps this distinction by itself might not make a difference, but that is not all that there is. In *Miramar,* the wage increases given to the three leaders of the decertification effort were entirely gratuitous and unrelated to any other

employment decision. The granting of gratuitous wage increases to a select group of anti-union employees, but not to any other employees, necessarily *discriminated against pro-union employees, as well as less ardent anti-union employees.* Thus, in *Miramar,* the discrimination was obvious, and the burden shifted to the employer under *Wright Line* to establish that the wage increases would have been given for other nondiscriminatory reasons. The employer could not carry that burden. Here, however, Respondent had a vacant job that required filling, and Downs-Haynes had applied for it before she even began her decertification efforts. Only one other employee applied for the position, and she too was anti-union. Indeed, no one contends, and the Judge did not find, that Respondent discriminated against Hobbick or any other employee. In these circumstances, there are no plausible reasons why a *Wright Line* analysis would be applied. Because there is no *discrimination* at all, the *Wright Line* affirmative defense never comes into play. Perhaps that is why the ALJ conspicuously does not discuss this defense at all.

But even assuming that *Wright Line* does, in fact, constitute the appropriate analysis, the Judge's finding of a violation must be reversed. Although sometimes stated in varying terms, the elements of the General Counsel's case include proof that (1) the employee engaged in activity protected by the Act, (2) the respondent was aware of such activity, (3) the alleged discriminatee suffered an adverse employment action, and (4) a nexus exists between the employee's protected activity and the adverse employment action. *Newcor Bay*, 351 NLRB 1034, 1036 (2007); *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Proof of animus toward the protected conduct is an essential element in establishing that the challenged action was unlawfully motivated. *Whirlpool Corp.*, 337 NLRB 726, 726 (2002).

Even when a prima facie case exists, "[t]he ultimate burden remains . . . with the General Counsel." *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). "[A] finding that

the General Counsel has met the initial Wright Line burden by making a showing sufficient to support the inference that protected conduct was a motivating factor in [the decision] does not mean that the [decision] was in fact 'unlawfully motivated.'" *Tom Rice Buick,* 334 NLRB 785, n. 6 (2001). The employer bears the burden of establishing its "affirmative defense" by a preponderance of the evidence, but "[n]othing in the Board's Wright Line decision indicates that the employer's burden cannot be met by using circumstantial, as opposed to direct, evidence," *Centre Property Management v. NLRB,* 807 F.2d 1264, 1269 (5th Cir. 1987), and "[t]he Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it." *Merillat Industries,* 307 NLRB 1301, 1303 (1992).

In finding that the General Counsel established a prima facie case under *Wright Line,* the ALJ observed only that "The Respondent was well aware of Downs-Haynes' decertification activities, and her promotion occurred while these activities were in full swing." (JD 18: 38-40). Notably absent from the Judge's analysis is any finding that any employee suffered any *adverse action* or that Respondent harbored *union animus.* The sole employee at issue who engaged in protected conduct was Downs-Haynes, and she had an absolute right not to be discriminated against based on her anti-union efforts. Respondent was certainly aware of her activities, but she suffered no adverse employment action. Further, the record is devoid of any evidence of animus toward the Union. While Respondent may have preferred to operate nonunion, nothing in its conduct suggests a propensity to discriminate against employees based on their position for or against the Union. Animus is typically established through proof of other unfair labor practices. Here, however, all of the other unfair labor practice allegations were dismissed by the Judge. Absent proof of (1) an adverse employment decision and (2) union animus, the General Counsel's *Wright Line* prima facie case necessarily fails.

The ALJ found a violation not because of any actual discrimination on the part of Respondent, but because she deemed that there were "simply too many irregularities surrounding the re-posting and hiring for the receiving clerk position, especially considering the timing of events, for me to conclude that it was conducted based on legitimate motives," and thus, in the Judge's view, the entire reposting process "was a pretext to award the position to Downs-Haynes." (JD 20: 9-14). The initial problem with this analysis is that neither *irregularities* nor *pretext* in making an employment decision in and of themselves violate the Act. It is only if the *irregularities* are between pro-union employees and other employees who are either anti-union or simply uninvolved that an inference of *unlawful pretext* can be drawn. Here, no such evidence exists. Thus, even if there were irregularities, they are not probative of unlawful discrimination. The Board does not sit as an arbiter of the consistency of an employer's administration of its employment policies and practices.

Further, the "irregularities" cited here are really not irregularities at all. It is suggested by the Charging Party that Respondent awarded the job to Downs-Haynes before the posting period had expired. But it is undisputed that in its second effort to fill the receiving clerk position, Respondent did not seek to compare either Downs-Haynes or Hobbick to any of the numerous external applicants. Respondent had already pursued an external candidate, who seemed well qualified, but who abandoned the job shortly after being hired. On this second time around, Respondent decided to select one of the two internal candidates. This was a lawful decision well within Respondent's discretion, and no basis exists for the Board to second guess the decision.

The Judge's findings that Ruffcorn had in fact received Downs-Haynes' application before it awarded the job to Taylor and that Respondent consciously chose not to interview Downs-Haynes because "she had less experience than Taylor, and as of early June had not

openly begun her activities in support of decertification" (JD 19:15-23) are not supported by the record. Although the Judge purported to discredit Ruffcorn's testimony on these points, she did so not because any witness contradicted Ruffcorn or because of Ruffcorn's demeanor, but because "the circumstances do not add up" and "make sense" only if Respondent had a preconceived plan to award the position to Downs-Haynes because of her decertification efforts. (JD 19:25-32). These findings, however, are not rational inferences from the record, but instead constitute nothing more than rank speculation.

Respondent's job posting policy neither expressly favors nor disfavors internal candidates, but it most certainly does not require that Respondent repeat a process that has been unsuccessful. There is nothing remotely "suspect" (JD 19:34-43; 20:1-2), or irrational about Respondent choosing to look internally. While one might speculate, as the Judge did, that Respondent sought to "reward" Downs-Haynes with this position, nothing in the record provides a basis for concluding that but for Downs-Haynes' anti-union activities, Respondent would have continued to look externally. Importantly, Respondent interviewed Hobbick, who clearly had no prior experience at 7:30 a.m. on June 30, (Resp. Exh. 20), a mere two days after Downs-Haynes started soliciting signatures on her petition. Thus, whatever change in direction occurred, it was initiated before June 30. In order to accept the Judge's conclusions, one must also conclude that in less than two days after the petition began circulating, and not knowing whether that petition would be successful, Ruffcorn hatched an elaborate scheme to award the position to Downs-Haynes and quickly scheduled an interview with Hobbick, which was nothing more than a pretext to make the subsequent award of the position to Downs-Haynes look neutral and legitimate. Respondent submits that it is the Judge's analysis that does "not add up" and that fails to "make sense." The documentation of the interviews and selection process demonstrate that

the interviews of Hobbick and Downs-Haynes were legitimate interviews in which Respondent sought to assess their suitability for the receiving clerk position. (Resp. Exhs 20, 21, 22; CP Exh. 1; Tr. 434-439). Nothing in this documentation suggests that Respondent was conducting a charade.

The Judge's conclusions suggest something of a built-in suspicion that any positive treatment of an anti-union employee must be because of that employee's anti-union activities. It bears emphasis that Downs-Haynes' anti-union activities were as much protected by §7 as were the pro-union activities of Herness and other Union supporters. By way of contrast, consider the situation if this was an initial organizing drive and Downs-Haynes was leading an effort to unionize. In such a situation, any refusal on the part of Respondent to consider her application and to focus exclusively on external candidates would be met with considerable suspicion and scrutiny.

As for the timing of the job award, Respondent was seeking to fill the position as quickly as reasonably possible. The posting dates generated on the Birddog system appear to be generated/updated somewhat automatically, and Ruffcorn testified that these dates were irrelevant. In fact, different versions of the posting reflect different ending dates. For example, with respect to the initial posting, GC Exhibit 12 reflects a posting period of May 21 to August 16; yet CP Exhibit 4 reflects a posting period of May 21 to June 13. It is undisputed that Ervin Taylor was actually hired on June 12 (and Respondent contends that he was offered the job on June 6). Similarly, with respect to the second posting, CP Exhibit 5 reflects a posting period of June 29 to July 17; whereas, GC Exhibit 14 reflects a posting period of June 29 to September 26. Clearly, the computer generated ending dates have no real world significance. Having decided to look internally and having interviewed the only two employees who had applied, there simply

was no reason to wait once Respondent concluded that Downs-Haynes was a suitable candidate.

As to the issue of Downs-Haynes' level of experience, her resume and application indicated that she had experience that was related to shipping/receiving at various previous employers, including Sunrise Staffing, Jackson Hewitt, and Loews. Her increase to $14 per hour placed her at the top of the contractual wage scale for support positions and was consistent with what Respondent had done for other employees who had prior experience. (Tr. 440-444). Even assuming that Respondent was overly generous in assessing Downs-Haynes' level of experience, the fact remains that Downs-Haynes only needed 3 years of relevant experience to reach the top of the scale. Based on her resume, it appears that before being hired by Respondent, she worked for 22 months for Loews, 6 months for Jackson Hewitt, and 7 months for Sunrise Staffing, a total of 35 months. While her duties included additional functions, she did perform shipping/receiving functions. Also, she had worked for Respondent for 4 years at the time, and according to the shipping/receiving supervisor, had filled in from time to time. In these circumstances, giving Downs-Haynes credit for 3 years of experience was not so irrational as to call into question Respondent's underlying motivation. This is particularly true because precision was not required. Booth testified that when an employee transferred into a different classification, Respondent slotted the employee into the new classification at the level closest to, but not above, their current pay rate, unless the employee had relevant experience that would justify placing her at a higher level. Under no circumstances, however, would the employee's pay rate be reduced. (Tr. 393-394). In Downs-Haynes' case, her existing rate of $13.60 fell mid-way between the 2-year support rate of $13.25 and the 3-year support rate of $14.00. Thus, even if she had no relevant experience at all, she would have been slotted in at 2-years, but her rate would have stayed at $13.60 until 12 months later when she reached the top 3-year progression rate. So, the question

facing Respondent was simply whether her level of experience was best characterized as 2 years (or less) or 3 years. If the former, her rate would remain at $13.60, but if the latter, it would go to $14.00. Respondent submits that either choice would have been rational, and that its choice to credit her with 3 years of relevant experience cannot be said to be unlawful. [5]

To summarize, no cognizable *discrimination* has been shown. Respondent simply filled a vacant position for which only two employees, both anti-union, had applied, with the clearly more qualified employee. The only employee who suffered an adverse employment action was Hobbick, and no one suggests that Respondent discriminated against her. Respondent requests that this allegation be dismissed.

CONCLUSION

Respondent requests that the consolidated complaint be dismissed in its entirety.

[5] The ALJ's finding that Respondent offered conflicting reasons for Downs-Haynes' raise (JD 20:4-7) is not based on any actual conflict. Ruffcorn's reference to Downs-Haynes' experience and the supervisor's reference to the greater responsibilities of the job are both accurate and neither is inconsistent with the other. Thus, the receiving clerk position was a more responsible position (Resp. Exh. 19), with a higher pay scale under the CBA. But where Downs-Haynes was slotted on this scale depended upon her prior experience. Both reasons were correct.

Respectfully submitted this 27th day of June 2018.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I certify that this day, I served the foregoing BRIEF on the following parties of record by Federal Express, Next Day Delivery:

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Dated this 27th day of June 2018.

/s/ Charles P. Roberts III